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ALIMONY AS A PROVABLE DEBT IN BANKRUPTCY PROCEEDINGS.

The peculiar character of alimony, and its uncertain status as a debt, liability, or duty, is giving rise to some interesting questions and conflicting decisions under the National Bankruptcy Act of 1898.

Whether a decree for alimony in divorce proceedings, directing payments in fixed amounts and at recurring intervals, may be proven in, and, if so, discharged by, bankruptcy proceedings, has already arisen in several instances under the present act, as it did also under the Act of 1867, and presents three aspects: (1). As to instalments *already accrued* and unpaid at the date of the adjudication. (2). As to instalments *accruing after the adjudication.* (3). As to the *liquidation of future instalments* under sec. 63 (b), providing that "unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate."

The material sections of the act bearing upon this question, in addition to the section last quoted, are those classifying provable debts, the section defining the word "debt," and the provision as to debts not released by a discharge.

Section 63 (a) is as follows:

"Debts of the bankrupt may be proved and allowed which are (1) a fixed *liability*, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as were not then payable and did not bear interest."

Section 1 (clause 11):

"'Debt' shall include any debt, demand, or claim provable in bankruptcy."

Section 17:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as . . . . are (2) Judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful or malicious injuries to the person or property of another, or . . . . (4) Were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

It is admitted, and is obvious, that a decree directing the payment of alimony does not come within any of the excepted classes under

section 17, and the question therefore resolves itself solely to whether such a claim is provable under section 63. If so, it is barred by a discharge.

No light is thrown upon the provability of such a claim, or indeed of any claim, by the statutory definition of a "debt" contained in the act (which is an interesting illustration of *petitio principii*), and it must therefore be determined by the language of sec. 63 as interpreted by the courts, together with the judicial decisions as to the purpose and intention of the act.

Under the Bankruptcy Act of 1867 it was held that alimony was not provable as a debt against the bankrupt, and consequently was not barred by a discharge[1]. That act was similar to the present one in that it contained no exception to alimony being barred by a discharge[2], but its provision as to debts provable was not so broad as the present act permitting "*any* fixed liability, as evidenced by a judgment or instrument in writing," to be proven, and it would seem clear that its scope was not intended to be enlarged in any way, so far as affects the discussion of this question, by the clause which allowed a creditor entitled to "rent, or other debt falling due at fixed and stated periods," to prove for a proportionate part thereof up to the time of the adjudication[3]. The only "contingent debts and contingent liabilities" allowed to be proven under the Act of 1867 were those "contracted by the bankrupt," and it expressly provided that no debts other than those therein specified should be provable.[4] Under its language, damages for a personal tort were held not provable.[5]

In England, under the Act of 1849, alimony recoverable under 29 Vict., c. 85, was held not provable as an annuity, and not barred by a discharge.[6] And this ruling has been repeatedly cited with approval under the Bankruptcy Law of 1883, as amended by the Act of 1890.[7] And although the contrary has also been held,[8] it was virtually in a case of an agreed settlement between the husband and wife, merely sanctioned by the court.

The present English Bankruptcy Law is in many respects similar

[1] *Re Garrett*, Fed. Cas. 5252; *Re Lachemeyer*, Fed. Cas. 7966.
[2] Secs. 33, 34, N. B. A. 1867.
[3] R. S. U. S. 1878, sec. 5071.
[4] Sec. 19, N. B. A. 1867.
[5] *Zimmer* v. *Schlehauf*, 115 Mass. 52.
[6] *Re Neal*, 14 Ch. D. 243.
[7] *Linton* v. *Linton* (1885), 15 Ch. D. 239; *Ex parte Fryer*, 17 Q. B. D. 718; *Re Hawkins* (1894) 1 Q. B. D. 25; *Haddon* v. *Haddon*, 18 Q. B. D. 776; *Re Henderson*, 20 Q. B. D. 509.
[8] *Re Batey*, 14 Ch. Div. 579.

to our present act, its provisions allowing as provable "all debts and liabilities, present or future, certain or contingent, except demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, to which the debtor is subject at the date of the receiving order," but its very broad scope would seem to be limited materially by sec. 37 (8), which defines 'liability' to mean an 'obligation founded on contract.' Its section defining and limiting the effect of discharge, until the amendment of 1890 (excepting judgments in actions for seduction), discharged all debts not due the crown, to certain public officers, or based on fraud.

From the English cases, cited above, it appears that so far as relates to claims to alimony accruing *after* the adjudication (or "receiving order"), the established English doctrine is against their provability; but while the point was not properly before them for decision in the much cited case of *Linton* v. *Linton*, or *Re Hawkins* (both *supra*), the language of the judges leaves no doubt as to the contrary being the rule as to alimony *already due* at the date of the adjudication.

Under our Act of 1898, the question has arisen and been passed upon in Kentucky, New Jersey, and New York, resulting in an unfortunate conflict of opinion. Judge Evans in the Kentucky case[1] held that instalments of alimony falling due at weekly intervals, and *accrued and unpaid* at the date of the adjudication, constitute a provable "debt," and consequently are barred by a discharge; and while in this case the court was called upon only to actually determine as to *already accrued* instalments, yet the opinion strongly inclines to the view that *future* instalments could properly be classed among the unliquidated demands against the bankrupt and be liquidated and made certain, pursuant to section 63 (b), and that if the State law gave it priority it would be allowed a preference out of the assets.

In the case of *Re Van Orden*,[2] decided by Judge Kirkpatrick of the District of New Jersey, the same view was taken, and an injunction was awarded to restrain the enforcement of a decree for alimony recovered in New York, and sought to be enforced by the collection of past due instalments in a chancery suit in New Jersey. The instalments sued for were all *due and unpaid* prior to the filing of the petition in bankruptcy. The court in discussing the nature of the obligation thus sought to be enforced said:

[1] *Re Houston*, 94 Fed. 118 (May, 1899).
[2] 1 Nat. Bankruptcy News, 475.

"The support and maintenance of a wife by the husband is an ever recurring liability from which he cannot by any act of his be freed. It is an obligation founded in law and justice, which may be enforced by action. Until the necessity for its enforcement arises, the extent of this liability is vague and uncertain, but when the aid of the court has been invoked, and it awards alimony, it thereby determines the amount of the husband's liability and by its judgment or decree requires the amount so fixed to be paid to the wife for her maintenance and support. 'From that time the husband is in effect a debtor, owing his wife the amount adjudged and determined in the decree.' *Wetmore* v. *Wetmore*, 149 N. Y. 521. That which before was a mere liability, now becomes a debt. The judgment establishes the indebtedness, and makes fixed and certain that which before was uncertain, and becomes the evidence of the debt it creates. . . . . It follows from what has been said that the debt which Mrs. Van Orden seeks to recover from the bankrupt in her chancery suit is a liability of the bankrupt, the amount of which is fixed, determined, and evidenced by the judgment of a court. As such, it is a provable debt in bankruptcy, and she should be enjoined from its further prosecution."

On the other hand, in two cases[1], alimony has been held not provable, by Judge Brown of the Southern District of New York. The opinion in these cases is a simple memorandum opinion, without discussion, review, or citation of precedent or authority, as follows: "In my judgment a liability to pay alimony would not be released by a discharge in bankruptcy (sec. 11), and no stay should therefore be granted on its enforcement except where a preference is sought."

Judge Brown's ruling has also been followed by a ruling of Referee Hotchkiss, in *Re Smith*[2], decided August 28, 1899, in an opinion in which, after reviewing the English and American cases and comparing the respective bankruptcy acts, the referee holds that the English doctrine that arrears of alimony accrued before the adjudication are dischargeable, not to be applicable under the language of the Act of 1898; and that alimony, whether temporary or permanent, accrued or to accrue, under the provisions of the New York Code, as well as counsel fees awarded thereunder, are not provable, and hence are not barred by a discharge. The opinion, which is an able presentation of this view, after adverting to the difficulty or impossibility of liquidating alimony to accrue in the future; to the rather technical objection that an order directing temporary alimony is merely an interlocutory order and not a judgment within the meaning of the phrase "fixed liability as evidenced by a judgment;" and to the fact that alimony awarded in a suit for a divorce *a mensa et thoro*, remains at all times subject to increase or decrease by the court awarding it, yet prefers to

[1] *Re Anderson*, 21 N. Y. Law Reg. 1246; *Re Shephard*, *Ib.*
[2] 1 N. B. News, 471.

base his opinion and ruling upon "the broad ground that in New York alimony is not a liability to *pay*, but an obligation to *do*, founded not on contract, but on natural duty, and therefore an adjudicated right belonging to the injured wife, and which is not a liability in the sense that the husband can be rid of it by his voluntary act in petitioning in bankruptcy."

There is much persuasive authority, and apparent analogy, for the "duty, not debt," view taken of alimony in these cases, to be found in the line of cases holding a claim for alimony to be non-assignable,[1] and not to be reached by attachment or sequestration for the wife's debts, at least such as exist prior to the decree awarding it,[2] and that it is not a "debt" within the various constitutional provisions forbidding imprisonment for debt,[3] nor "founded on contract,"[4] as well as several decisions under the act of 1867, that judgments and decrees in the nature of penalties or fines imposed for wrongful or criminal acts, or to enforce a moral duty, were not barred by a discharge.[5] Examples of the last class are amounts decreed for the support of a bastard child,[6] and damages for seduction.[7]

It is submitted, however, that reasoning by analogy, or an attempt to treat as precedents decisions under differently worded statutory enactments, should be considered with great caution, and are frequently misleading. Where the law-making power creates a right, or establishes a new method for the enforcement or regulation of a right, its language, when plain and unmistakable, is not to be modified, amended or altered by judicial construction, under the guise of interpretation of its spirit. And it is unquestioned that in the enactment of an uniform bankruptcy law, Congress had the supreme power to include within its operation any or all rights growing out of contract, tort or public policy, and that the advisability of including or excluding particular classes of rights, or the hardships occasioned thereby, are questions properly referable only to Congress for amendment, and not to the courts for modification or correction. It would seem, therefore, that whether decrees or judgments for alimony, based upon

[1] *Mensie* v. *Anderson*, 65 Ind. 239; *Noyes* v. *Hubbard* (Vt.), 15 L. R. A. 394.

[2] *Romaine* v. *Chauncey*, 129 N. Y. 566.

[3] *Sheaf* v. *Sheaf*, 36 N. H. 155; *Ex parte Perkins*, 18 Cal. 60; *Wightman* v. *Wightman*, 45 Ill. 167; *Carlton* v. *Carlton*, 44 Ga. 216; *Pain* v. *Pain*, 80 N. C. 332.

[4] *Kemster* v. *Evans* (Wis.), 15 L. R. A. 391; *Jordon* v. *Westerman*, 62 Mich. 170; *Hackley* v. *Muskegon*, 58 Mich. 454; *Re Robinson*, 27 Ch. D. 160.

[5] Loveland on Bankruptcy, 621.

[6] *Re Cotton*, 3269 Fed. Cas. (s. c. N. Y. Leg. Obs. 370); *Nassau* v. *Parker*, 2 Pa. L. J. 298.

[7] Same cases. But *contra*: *Re Sullivan* (1898), 1 Nat. B. News, 380.

the "moral obligation" or "sacred duty" to support, stand on any other or different grounds as to being released by a discharge than do judgments and decrees based on a loan of money or an assault and battery, is to be determined solely by the law as it is written; the determination is for the law-making power alone, and its intention in the enactment is to be ascertained by the language used.

If Congress has expressly or by fair implication excepted such judgments or decrees they are not released, otherwise they are. Such exception has been made in certain instances, to-wit, judgments for fraud, willful injury and embezzlement, but there is certainly no express exception in the case of alimony.

Alimony, whether considered as a debt or a duty, as an obligation founded on contract or based on public policy, would certainly seem to be a "liability" of the highest character—a continuing liability, recognized by law, and from which only death or divorce can rid the husband. But like any other debt, duty or obligation, however sacred, it can be and frequently is disregarded and broken, and in such cases the courts can judicially ascertain, in dollars and cents, the *pecuniary* extent of that liability for the future. In other words, they can and do render it a "fixed liability," not only in that it exists, but in amount. When this is done, by directing payment of stated sums at recurring intervals, upon the failure to discharge this fixed liability it becomes, not absolute, for it is already absolute, but enforceable in the same manner as any other broken legal obligation which has been ascertained by judicial proceedings, viz., by execution from the court which has adjudicated the liability. Without resorting to process of contempt or attachment, execution may be had as upon any other decree or judgment, and the same lien is created thereby. By its registry it will constitute a lien on real estate, and if, in the inception of the divorce proceeding, it has been sought to subject specific property to the discharge of the marital duty of support by setting it out, describing it and praying that it be so subjected, a *lis pendens* is created.[1] Thus the legal and moral duty, its existence and extent, having been determined, the result is a "fixed liability."

The duty to support, when its extent has been thus judicially ascertained, may be enforced by the court's process to the full extent of its power; but if, notwithstanding the husband still fail or refuse to so specifically perform this duty from day to day, or from time to time, in the nature of things at each breach it ceases, as to that period, to

[1] 2 Am. & Eng. Enc. Law, 162-3.

be an existing, enforceable *duty*, and becomes simply a violated obligation to which the ordinary laws applicable to that class of obligations attach. While it cannot properly be characterized as damages for the breach of the marital duties, alimony, decreed and due and unpaid, is to be collected, and the decree awarding it enforced, in the same manner as damages for any other wrong or breach of contract, with such additional methods only as are given by statute or established practice. The duty to support is a continuing duty, arising anew each day, but it is impossible to specifically enforce the performance of that duty as to a period already past, otherwise than by the collection of the amount previously ascertained as applicable to that period, and by its payment to the wife. It is undoubtedly the husband's duty, legal as well as moral, to feed, clothe and provide for the wife each month and each day, but to recall the calendar so as to compel the husband to give his wife in February the daily provision she should have received in January, *nunc pro tunc*, as it were, and thus revive a violated and broken obligation into a subsisting and present one, is manifestly beyond the power of any court. The existing *duty* for the period past is broken and at an end, and there remains only the quasi-damages adjudicated as compensation therefor.

The unique status of alimony in the eyes of the law grows chiefly out of its having long been considered as an incident of and inseparable from an investigation or proceedings affecting the marriage relation, and having no existence as a separate and independent right. This was its character before the ecclesiastical courts, and until recently in all chancery courts in the exercise of their divorce jurisdiction. But at the present time, in some sixteen States of the Union, it is recognized as an independent right, without the aid of statute so declaring it; while in ten others it is provided for by statute as a proceeding independent of divorce or separation.[1] And it should also be borne in mind that in case of a divorce *a vinculo* the amount, and time of payments, of permanent alimony, in the absence of a reservation in the decree awarding it, does not remain subject to modification or change by the court except to the same extent and in the same manner as all other decrees.[2]

The language of the Bankruptcy Act of 1898, not being uncertain or doubtful, but providing in plain language for the proof of all "fixed liabilities," with certain exceptions therein enumerated, among which alimony is not placed, would seem to leave no room for inter-

[1] 2 Am. & Eng. Enc. Law, 94. [2] *Ib.*

pretation, or the exclusion of any form of demand or claim coming within its plain terms, upon "the broad ground of moral obligation," or upon any other ground conceived as wise in the discretion of the courts charged with its administration. The reopening or investigation of the cause of action, or the basis of the liability which has become so fixed, is nowhere committed to their discretion.

Upon principle as well as authority, it would seem that the decisions of Judges Evans and Kirkpatrick, following the English cases, holding alimony *already accrued at the date of the adjudication*, to be provable and therefore barred, are within the spirit as well as the letter of the act.

As to instalments *accruing and to accrue after the adjudication*, the contrary would seem the correct view, as the duty to support being a continuing one it is really a new liability arising from day to day after the adjudication, to which the subsequently acquired property or earnings of the bankrupt remain liable in the same manner as upon a debt contracted, or liability entered into, after the adjudication.

And for the same reason such future liability cannot properly be liquidated under section 63 (b).

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